1984

In The Matter of The Estate of : Rolando S. Garza

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF: ROLANDO S. GARZA	* * * * *	Case No. 19360

BRIEF OF RESPONDENT

RESPONSE TO APPELLANTS APPEAL FROM THE FINAL JUDGMENT OF THE HONORABLE TIMOTHY R. HANSEN, GRANTING RESPONDENT'S WRONGFUL DEATH CLAIM AGAINST THE ESTATE OF ROLANDO S. GARZA.

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BRIEF OF RESPONDENT

STATMENT OF THE NATURE OF THE CASE

This case deals with a wrongful death claim which was granted in favor of Respondent and against Appellant.

DISPOSITION IN THE LOWER COURT

Judge, Timothy R. Hansen, after a full evidentuary hearing, granted the Respondent's wrongful death claim against the Estate of Rolando S. Garza and awarded Respondent $150,000.00 in general damages and $50,000.00 in punitive damages. In making his ruling, Judge Hansen determined that the relevant statute of limitations were tolled.

RELIEF SOUGHT

Respondent seeks for the affirmation of the trial court's rulings. Appellant seeks the reversal of the trial court's determination that the statute of limitations was tolled and a reversal of the Court's grant of the wrongful death claim and punitive damages.

FACTS

On June 28, 1978, Rolando S. Garza maliciously and wrongfully put a gun to his spouse's, Diana Jeannette Lopez Garza, head and shot her to death. [R.91 and Deposition of Vickie Nielsen, page 8]. The lower Court found that the killing was not only malicious and wrongful but was also totally unjustified, [R.91].

Rolando S. Garza and Diana Jeannette Lopez Garza were married on June 21, 1975, [R.88]. Rolando and Diana had two children born from their marriage namely, Juanita B. Garza, born October 2, 1976 and Rosemary Garza, born November 16, 1977 [R.88].

Shortly after killing Diana, Rolando S. Garza shot himself to death [Deposition of Vickie Nielsen, page 15]. Therefore, Juanita and Rosemary, who were both less than two years old, were left as orphans. Cleo Garcia became the Court-appointed guardian and conservator of Juanita and Rosemary, (R.88).

On June 18, 1981, Roman Garza, the father of the deceased Rolando S. Garza, was appointed as personal representative of Rolando S. Garza's estate (R.88). Roman Garza, while personal representative and through his attorneys, caused a publication of Notice to Creditors of the Estate to be made pursuant to Utah Ann.Section 75-3-801, 803 [R.19,88].

On December 4, 1981, the first publication of Notice to Creditors was made in a newspaper of general circulation in Salt Lake County - even though three years had already expired since Rolando S. Garza's death [R.19, R.88].

Cleo Garcia, as guardian and conservator for Juanita and Rosemary, filed a wrongful death claim with the Court against the Estate of Rolando S. Garza on the 3rd day of March, 1982 in the amount of $300,000.00 [R.20, R.89]. A copy of this claim was mailed to Roman Garza and his attorneys of record [R.20]. At the time this wrongful death claim was filed, Roman Garza was the Court appointed personal representative for the Estate of Rolando S. Garza.

In March of 1982, Cleo Garcia filed a petition with the Third District Court asking for an order of removal of Roman Garza as personal representative stating that Roman Garza had no standing to serve as personal representative. Cleo Garcia also asked the Court that she be appointed as personal representative [R.25]. On April 9, 1982, approximately five weeks after Rosemary and Juanita filed their wrongful death claim, the Court ordered that Roman Garza be dismissed as personal representative and Cleo Garcia was appointed as personal representative in his stead [R.33-34].

Neither Roman Garza or Cleo Garcia filed a disallowance of claim within sixty (60) days after Rosemary's and

Juanita's wrongful death claim was filed as provided for by Utah Code Ann. § 75-3-804 [R.92].

Cleo Garcia, acting as personal representative, filed a Petition for payment of the wrongful death claim on January 24, 1983 [R.45-49]. The Petition was initially heard on February 9, 1983 before the Honorable Timothy R. Hansen [R.55]. At that time, Roman Garza's attorney, John Black, appeared and suggested that there was a conflict of interest between Cleo Garcia acting as personal representative of the Estate of Rolando S. Garza and as guardian and conservator for Rosemary and Juanita Garza [R.55]. At that time, counsel for Cleo Garcia stipulated that Roman Garza's attorneys could act for the Estate to defend against Rosemary's and Juanita's wrongful death claim. Rosemary's and Juanita's wrongful death claim were again dealt with in the form of an Evidentuary Hearing before the Honorable Timothy R. Hansen on May 26, 1983 [R.83]. At that time, the Court found that because of the wrongful killing of Rosemary's and Juanita's mother by Rolando S. Garza, two-thirds (2/3) of Rosemary's and Juanita's claim ($150,000 in general damages and $50,000 in punitive damages) should be allowed [R.95-96].

FACTS IN DISPUTE

Appellants stated on page 2 of their brief that "Rolando Garza was also survived by another minor daughter,

Jeannie Lisa Garza..." This "fact" has never been established.

Appellants also stated on page 2 of their brief that "Roman Garza collected all assets of the estate and settled all claims then existing against the estate, leaving a balance of $12,382.90 in the estate." These "facts" were also never established.

ARGUMENT

POINT I.

THE TRIAL COURT CORRECTLY RULED THAT SECTION 75-3-803(1) (b), UTAH CODE ANNOTATED, IS TOLLED DURING THE MINORITY OF THE GARZA CHILDREN.

Appellant argues that Utah Code Ann. Section 78-12-36, did not toll Utah Code Ann. Section 75-3-803(1)(b) This argument relies almost exclusively upon the dissenting opinion in Switzer v. Reynolds, 606 P.2d 244 (Utah 1980), which cited an 1887 case from Kentucky for the proposition that public policy concerns must take precedence over individual hardship. Appellants then argue, without legal support or citations, that as a matter of public policy it is more important to provide for the speedy closure of estates than to allow the minority of heirs to toll a probate statute which bars claims not raised within three years of the decedent's death. Appellant's position is simply incorrect as a matter of law for several reasons. First, the trial court specifically considered the public

policy concerns advanced by the Appellant and ruled against Appellant stating:

> The public policy to protect minors outweighs the public policy to quickly resolve claims against probate estates and therefore the statute of limitations contained in Utah Code Annotated, as amended, Section 75-3-803(b), is tolled because of Utah Code Annotated, Section 78-12-36 since Juanita B. Garza and Rosemary Garza are minors (R.93).

Second, the case law in this state clearly supports the conclusion reached by the trial court. In Switzer v. Reynolds, supra, the Utah Supreme Court held that the statute of limitation relating to wrongful death actions (Section 78-12-28 (2)) was tolled by Section 78-12-36 (the same statute under consideration in this action). Switzer, 606 P.2d at 249. In Szarak v. Sandoval, 636 P.2d 1082, 1084-1085 (Utah 1981), the Utah Supreme Court stated with respect to Utah Code Ann. § 78-12-36 U.C.A.:

> Characterizing this statute as an expression of "the general legislative intent to protect the causes of minors," this Court applied this statute to prevent a minor's being barred from pursuing an action for personal injuries. Scott v. School Board, Utah, 568 P.2d 746, 748 (1977). In doing so, we pointed out that because parents or natural guardians "have no specific legal duty" to commence actions of this nature, without such a statutory protection "the minor is left completely without a remedy." Id. at 747. Under the wording of the statute and the reasoning of the Scott case, 78-12-36 would clearly prevent the statute of limitations from barring a paternity and child support action by the child in this case, who was only six years and three months of age when this action was commenced.
>
> Like the minors in the Szarak case, the minors in

this action had no person who was under a specific legal duty to commence an action on their behalf, and without the statutory protection provided by Section 78-12-36, they likewise would be left without a remedy.

The last reason why Appellants' position is incorrect is found in the language of Section 78-12-36 which clearly mandates that all statutes of limitations are tolled during the minority of a person entitled to bring an action:

> If a person entitled to bring an action, other than for the recovery of real property, is at the time the cause of action accrued, ...:
> (1) Under the age of majority;...
> ....
>
> The time of such disability is not a part of the time limited for the commencement of the action.

The language of this statute is clear and there are no exceptions within the statute or case law which would apply to this case and thus Section 75-3-803(b) of the probate code was tolled as a matter of law by the minority of the Respondents.

POINT II

THE ESTATE WAIVED ANY STATUTE OF LIMITATIONS DEFENSE IT MAY HAVE HAD BY PUBLISHING NOTICE TO CREDITORS ON DECEMBER 4, 1981.

In the event that the Court does not rule that Section 75-3-803(1)(b) was tolled by Section 78-12-36, then the Court must decide whether the trial court was correct in its ruling "The estate waived the three-(3)-year statute of limitations found at Utah Code Annotated, as amended,

75-3-803(b), by filing notice to creditors on December 4, 1981" (R.93).

The Utah Rules of Civil Procedure clearly state that a defense (such as the defense of the statute of limitations) to a cause of action must be affirmatively plead or it is waived. See Utah R. Civ. P. 8(c) and 12(h). Likewise, a person or entity may be deemed by his or its conduct to have waived the right to assert a specific claim or defense with respect to a cause of action. 28 American Jurisprudence 2d, Estoppel and Waiver 166. Respondent's acknowledge that Utah Code Ann. § 75-3-802, U.C.A., provides that waivers by personal representatives of statutes of limitations in estate matters are to be treated somewhat differently than other waivers as a matter of law. Section 73-3-802, by its terms, only allows the personal representative to waive any defense of limitations available to the estate if said representative has "the consent of all successors whose interest would be affected...."[Emphasis added]. This statute is clear, it only requires consent by those successors whose interest "would be" and not "may be" affected. While it is clear that the Respondent had a present legal interest which "would be" affected by the waiver of the personal representative, it is equally clear that Jeannie Lisa Garza, did not at the time of the waiver

(nor at the present time) have present legal rights which "would be" affected. It has not, as of this date, been established that Rolando S. Garza is Jeannie Lisa Garza's father or that she is a person whose interest "would be" affected by the waiver which has taken place.

The statute of limitations was effectively waived by the fact that the personal representative of the Garza Estate published a notice on December 4, 1981 inviting creditors to submit claims which they had against the Estate. This waiver was made with the full consent of the Respondent. As has been shown, the trial court's ruling was correct on the waiver issue, and Appellant cannot now be heard to complain that the waiver was not effective.

POINT III

ROSEMARY'S AND JUANITA'S CLAIM AGAINST THE ESTATE OF ROLANDO S. GARZA WAS ALLOWED, AS A MATTER OF LAW, SINCE THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ROLANDO S. GARZA DID NOT FILE A NOTICE OF DISALLOWANCE.

Cleo Garcia, as guardian for Rosemary and Juanita, filed a claim against the Estate of Rolando S. Garza on March 3, 1982 in the amount of $300,000.00 [R20, R89]. At the time this wrongful death claim was filed and until April 9, 1982, Roman Garza was the personal representative of the Estate. From April 9, 1982 to the present, Cleo Garcia has served as personal representative. Neither Roman Garza or Cleo Garcia filed a disallowance of claim within sixty (60)

days after Rosemary's and Juanita's wrongful death claim was filed [R92].

Utah Code Ann. 75-3-806(1) in part states:

> ...Failure of the personal representative to mail notice to a claimant of action on his claim for 60 days after the time for original presentation of the claim has expired has the effect of a notice of allowance.

Therefore, the Respondent's wrongful death claim was allowed, as a matter of law, on May 3, 1982.

POINT IV

THE TRIAL COURT PROPERLY AWARDED PUNITIVE DAMAGES AGAINST THE ESTATE.

Appellant first argued with respect to Point IV of its brief that the imposition of punitive damages by the Court was improper because the Court did not take any testimony with respect to the earning capacity of the deceased. Respondent disagrees with this statement on the"facts". In any event Appellant failed to cite any authority for this proposition and Respondent is unaware of any case which would require such testimony before the Court is allowed to impose such damages. The Utah Supreme Court has only required proof of "willful and malicious" conduct as a condition predcident to the imposition of punitive damages. Behrens v. Raleigh Hills Hospital, Utah Sup. Ct. No. 18093, filed December 22, 1983 at page 9 and cases cited therein; Prince v. Peterson, 538 P.2d 1325, 1329(Utah 1975) (punitive damages "can be awarded if the jury finds that

such an injury was willful and malicious") Palombi v. D&C Builders, 452 P.2d 325, 328 (Utah 1969). This requirement has cleary been met and thus this is an appropriate case for the imposition of such damages [R.92 and 93-94].

Appellant next contends that punitive damages are not recoverable against an estate because the general policy of punitive damages is to punish a wrongdoer and to deter particularly culpable, dangerous conduct. Appellant argues that an estate cannot be deterred from future misconduct and thus the policy behind the imposition of punitive damages is not served in this case. What Appellant fails to point out to the Court is that the purpose behind punitive damages is not only to punish the wrongdoer and deter his future conduct but also to "serve as a wholesome warning to others not to engage in similar misdoings." Kesler v. Rogers, 542 P.2d 354, 359 (Utah 1975); Accord: Prince v. Petersen, 538 P.2d 1325, 1329 (Utah 1975); Palombi v. D&C Builders, 452 P.2d 325, 328 (Utah 1969). The imposition of punitive damages in this action serves as a warning to others not to wrongfully and maliciously take the life of another and thus the award is proper because it clearly accomplishes "a public objective not accomplished by the award of compensatory damages." Behrens, supra, at page 9.

CONCLUSION

For the above reasons, the decision of the trial court should be affirmed.

DATED this 16th day of February, 1984

Respectfully submitted,

BRAUNBERGER, POULSEN & BOUD, P.C.

By Robert J. Poulsen
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AFFIDAVIT OF MAILING

I hereby certify that two true and correct copies of the foregoing Motion of Dish Point were mailed first-class postage prepaid on the 14th day of February, 2018 to the following:

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